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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 493

CARL WILHELM BAUMGARTNER,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PETITIONER.

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SUPREME COURT OF THE UNITED STATES

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No. 493

CARL WILHELM BAUMGARTNER,
Petitioner,

vs.

UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER.

On writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review the decision of that Court on September 11, 1943 (R. 338-349) affirming a decree of the District Court of the United States for the Western District of Missouri, Western Division, entered November 11, 1942 (R. 25-27) cancelling a decree of naturalization of the petitioner entered September 26, 1932 (R. 248-251).

I.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is reported in 138 F. (2d)

29 (C. C. A. 8th, 1943) (R. 338); the opinion of the United States District Court for the Western District of Missouri, Western Division, is reported in 47 F. Supp. 622 (D. C. Mo., 1942) (R. 25).

II.

Jurisdiction.

1. The statutory provision is Judicial Code, Section 240(a), 28 U. S. C. § 347, as amended by the Act of February 13, 1925, Chap. 229, § 1, 43 Stat. 938.

2. The petition for certiorari was filed November 18, 1943, and granted January 17, 1944, in forma pauperis (R. 352) 320 U. S. —, 88 L. Ed. 376 (1944).

III.

Statement of the Case.

Petitioner was lawfully admitted into the United States at the port of New York on February 9, 1927 (R. 243). He filed a declaration of intention to become a citizen of the United States on June 14, 1927 (R. 243-244). On May 16, 1932, he executed and filed his petition for citizenship in the District Court of the United States for the Western District of Missouri (R. 244-247). On September 26, 1932, he signed and took the oath of allegiance as a citizen and Certificate of Citizenship No. 3532623 was issued to him (R. 247-248).

In point of time the next entry on the citizenship record of petitioner is on August 21, 1942, approximately ten years after citizenship was granted, when the government, pursuant to the provisions of the Nationality Act of 1940, Section 338, 54 Stat. 1158 (8 U. S. C. § 738) sought to have that citizenship revoked. The complaint (R. 1-4),

to which there was attached an affidavit of one J. W. Menzie (R. 4-22), alleged that fraud was practiced at the time of gaining citizenship, i. e., September 26, 1932, in that petitioner did not, when taking the oath of allegiance, abjure all allegiance to the Third German Reich and all others except the United States of America and was not attached to the principles of the Constitution of the United States, and therefore his citizenship was illegally procured. On October 26, 1942, petitioner by his answer specifically denied all allegations against his good faith and loyalty contained in said complaint and affidavit attached thereto, and under oath reasserted his adherence to the United States of America, its Constitution, laws, and principles (R. 22-25). After hearing, cancellation of petitioner's Certificate of Citizenship was on November 11, 1942, decreed by the District Court, which decree was on September 11, 1943, affirmed by the Circuit Court of Appeals for the Eighth Circuit. This Court granted certiorari and allowed petitioner to proceed in forma pauperis.

Briefly, the District Court (R. 25) and the Circuit Court of Appeals (R. 338) decided that despite petitioner's unblemished record and good conduct at all times, his reaffirmation of adherence to the Constitution and his willingness to support the same, and despite his confirmation of the renunciation of allegiance to any other person or country, the fact that petitioner made certain entries in his diary between December 1, 1938, and June 17, 1941 (R. 251-297), many indicating pride in the current activities of the German government and several critical of the Roosevelt administration, and the fact that petitioner between the late fall of 1936 and the early spring of 1941 in his conversations with others attempted to justify and explain certain German activities and expressed his ap-

proval thereof, was sufficient proof that petitioner made a false oath in 1932 that he was attached to the principles of and would support and defend the Constitution of the United States and bear true allegiance to the same.

IV.

Basic Questions Involved.

The fundamental questions here involved are:—

(1) Whether the government has established by competent evidence that petitioner fraudulently or illegally procured his citizenship.

(2) Whether to differentiate between the right of American-born citizens and the right of naturalized citizens to freely express personal views concerning national and international affairs does not violate the First and Fifth Amendments to the Constitution of the United States.

(3) Whether Congress can constitutionally attach to the exercise of the judicial power under Article Three of the Constitution authority, in the absence of extrinsic fraud or errors appearing on the face of the record, to reexamine a final judgment rendered by a court of competent jurisdiction granting a certificate of citizenship.

The following basic, though subsidiary, questions are also involved:—

(4) Whether one who believes that political philosophy and action of a nature obnoxious to and in conflict with generally accepted American standards are justifiable and proper in a foreign country because of the existing factual situation as he believed it to be, cannot at the same time be loyal and attached to the principles of the Constitution of the United States.

(5) Whether, in the light of intervening events, statements oral and written of a naturalized German citizen as to current events during the years 1937 and 1941 constitute unequivocal and convincing evidence of his state of mind during the years 1927 to 1932.

The questions here presented are of fundamental importance. The scope and implication of the questions involved far exceed the injustice to one individual. The decision of the District Court sustained by the Circuit Court of Appeals is a holding that as a matter of law the oath of allegiance in a naturalization proceeding is a fraudulent act which renders illegal the decree of naturalization if many years later the naturalized citizen entertains and expresses political beliefs at variance with those which some Federal court then believes to be correct for a loyal American citizen.

The soundness or wisdom of the political beliefs expressed by the petitioner is not here involved. But this Court is asked to determine whether freedom of political thought and belief, together with the right of articulate expression of such thought and belief, is the constitutional right of all citizens, native-born and naturalized alike, so long as it is not an advocacy of the use of force and violence to overthrow the government.

V.

The Facts.

Petitioner was born January 20, 1895, at Kiel, Germany (R. 145), and his wife was born at Gotha, Germany. His paternal ancestors, relatively well-to-do, for generations were flour millers and occupied a respectable place in the society of their community. Petitioner attended classical high school in Germany and graduated therefrom in 1914 when nineteen years of age (R. 146). He then enlisted in

the German Army in September, 1914 (R. 147), became a Corporal in 1915, and received a commission in 1917. In April of that year he was taken prisoner by the English and was transferred to England, where he remained a prisoner of war until November, 1919, when he was repatriated (R. 148-149). He then resumed his education at the University of Darmstadt and graduated therefrom in 1925 with a degree in Electrical Engineering. He was employed by a public utility at Freiburg until he came to the United States in February, 1927 (R. 150).

Petitioner was married in January, 1927, in Germany (R. 150), and his wife joined him here in September of that year (R. 147). They have three children, all born in the United States (R. 147). He was employed by the Kansas City Power & Light from 1927 to the time of his trial. Petitioner has never returned to Germany nor planned to return to Germany, and on several occasions so stated. Petitioner was born a Roman Catholic and remained so until he came to the United States, when he joined the Congregational Church and remained a member four or five years, but now is a member of St. Mark's Lutheran Church Protestant (R. 148). Petitioner came to America because from his reading it appealed to him, because he had friends here, and because he wanted to leave the economic ruin in Germany and look for another place where he could make a living (R. 152-153). He had no brothers or sisters and his parents are dead (R. 148, 182).

Petitioner belongs to the Steuben Society, the Turner Gymnastic Society of Kansas City, and to the American Institute of Electrical Engineers (R. 154), and for a time belonged, before and after coming to the United States, to the German Society of Electrical Engineers, which he discontinued in 1936 or 1937 because the dues were too high. There was no evidence which in any way connected the petitioner with any subversive activities. Petitioner had

no literature of any kind from Germany after he left there, except that he subscribed for the Berliner Illustrierte Zeitung in 1929 or 1930 for his wife (R. 158). He later received without solicitation booklets from the German Library of Information in New York and "Facts in Review" from the same source. This literature came to him from 1939 to 1940 when the German Consulate in New York was discontinued (R. 156-157). Petitioner also received a German language newspaper (formerly the Kansas City Presse) from Omaha, Nebraska. (R. 157).

Petitioner's wife and children are now in Germany, whither they went in May, 1939, with the intention of returning in six months or a year but were never able to do so (R. 157-160). Petitioner's wife cabled from Germany when war was declared that she wanted to come home (R. 165), and Petitioner attempted to borrow money so she and the children could return, but he was unable to do so (R. 159-160).

There is no evidence of anything objectionable done by petitioner at any time, nor any evidence of any statements after June, 1941, to which the government takes exception.

Petitioner has made clear explanations of all of his statements in his diary (R. 173-180, 188-189) and has either denied or explained all the "conclusions" of witnesses attributing statements to him (R. 151-172). J. W. Menzie, the F. B. I. agent, whose affidavit is attached to the complaint, admitted that petitioner made no effort to conceal anything and that everything he said in his statement (R. 239) was true with the exception of his statements that he was not anti-British and anti-Jewish (R. 106-107).

No subversive act of any kind is charged against petitioner, and he is not charged with counseling others to take action. The worst that can be said about petitioner is that he expressed, for the most part in 1938, 1939 and 1940, certain political views sympathetic to Germany and

Hitler and at variance with the political thinking of most American citizens.

He was in sympathy with the "America First Committee" and did not believe "it was good for this country to go to war" (R. 164). He believed as a citizen he had a right to express his views (R. 169). He is neither charged with nor proved to have had any official or unofficial connection with Germany or Hitler or any agents of either Germany or Hitler.

In essence, the petitioner is shown to be an intelligent, well educated man of good character, ability and reputation, interested abstractly in philosophy, religion, and politics, with a natural love for the country of his birth but loyal to the United States, his country by adoption. The loyalty of petitioner to the United States is more than lip-service or flag waving; it consists in living as an honest, law-abiding citizen, doing what he thought was in the public interest, and in the intelligent and honest expression of political and economic views, which is essential for the proper workings of a democratic government "of the people, by the people and for the people."

VI.

Applicable Statutory and Constitutional Provisions.

The applicable statutory law and provisions of the Constitution are set forth in Appendix A to this brief (*infra*, p. 41).

VII.

Analysis of Opinions of the Courts Below.

(a) District Court.

Findings of Fact.

The findings of fact made by the District Court are (R. 25-26):—

(1) Petitioner became a naturalized citizen of the United States September 26, 1932, on an application filed May 16, 1932.

(2) To obtain naturalization, he swore in open court that he renounced all fidelity to any foreign state and particularly to The German Reich and that he would bear true faith and allegiance to the Constitution and laws of the United States.

(3) "At the very time he took that oath he accepted as sound and believed to be righteous the principles of government then advocated and thereafter put in practice by Adolph Hitler, his real loyalty was to those principles."

(4) "Hitler's principles are diametrically opposed to those of the United States. Hitler believes in dictatorial rule, not in government 'of the people, by the people and for the people.' Hitler despises and has destroyed, where he could, representative government. Hitler asserts the Nazis are superior to other men, entitled to superior privileges, that America's doctrine that 'all men are created equal' is the raving of idiots. Hitler, by his tools, puts to the torch cathedrals, synagogues and churches; desecrates the lodges of Free Masons; burns libraries and books; imprisons priests, rabbis, clergymen; tortures the old, the weak, the young, if they are not of his so-called 'superior' race; robs helpless individuals of minorities of their property, sends them penniless into exile, murders hundreds of thousands of them in cold blood. Hitler enslaves millions, tramples under foot peoples who were free, who asked only they they might live in freedom; perverts and debases the minds and souls of young men and young women. *Baumgartner has approved in his own handwriting, either expressly or by inference, all these infamies.* He defends them. He says that Hitler's end justifies Hitler's means."

Conclusion of Law.

"There is only one possible conclusion to be reached. The order admitting Carl Wilhelm Baumgartner to citizenship and the certificate of citizenship granted him were obtained by fraud; they were illegally procured by means of an oath falsely made, that he had renounced all fidelity to the German Reich and that he would bear true faith and allegiance to the Constitution and laws of the United States." (R. 27).

It is clear that the District Court based its decision of illegality solely on its holding that the oath of allegiance was fradulently taken.

Petitioner in response to a question from the Court testified that he was loyal to the United States and that this loyalty was the same at the time of his trial as it was when he took the oath of allegiance (R. 183). Upon this, the Court held that petitioner's expressions of sympathy for Germany and her new government made in his diary in 1938 to 1941 must be read as though written in 1932 and required the cancellation of his citizenship.

(b) **Circuit Court of Appeals.**

The Circuit Court of Appeals in its opinion (Woodrough J. dissenting) (R. 338-351) considered both the charge of fraud and illegality without any attempt to analyze the significance and interdependence of those charges in the instant situation. It considered itself bound by the findings of the District Court.

> "The narrow question of fact in the present suit is whether appellant's allegiance to this country at the time of his naturalization was unqualified and unconditional, or, stated another way, it is whether his oath of allegiance was made without any mental reservation whatsoever in favor of the country of his origin, the German Reich. That the question is one of fact can

> not be doubted. * * * The finding of the trial judge upon the question of fact presented is conclusive on this court unless clearly erroneous * * *."
> (R. 347).

It held that the government need sustain its charges only by a clear preponderance of convincing evidence (R. 346); distinguishing the case of *Schneiderman* v. *United States*, 320 U. S. 118 (1943), because in that case "the charge was not fraud but that the judgment of naturalization had been illegally procured." (R. 346).

Judge Woodrough filed a strong dissenting opinion (R. 349-351).

VIII.

Specification of Errors to Be Urged.

1. The Court below erred in holding that there is sufficient evidence to sustain a finding that the petitioner fraudulently and illegally procured his citizenship.

2. The decree of the Court below is erroneous in that it denies to petitioner the freedom of speech guaranteed him by the First Amendment to the Constitution of the United States.

3. The Court below in applying a different standard of freedom of speech to a naturalized citizen from that applicable to a native-born citizen violated the Fifth Amendment to the Constitution of the United States.

4. Section 338 of the Nationality Act of 1940 as applied to this case by the Court below is unconstitutional in that it attempts to attach to the exercise of the judicial power under Article Three of the Constitution authority to annul, on grounds other than lack of jurisdiction or extrinsic fraud, the final judgment of the court which granted to petitioner a certificate of citizenship.

IX.

Summary of Argument.

I. The government has failed to establish that petitioner fraudulently or illegally procured his citizenship. The burden is on the government to prove by clear, unequivocal, and convincing evidence that petitioner during the five years preceding his naturalization was not loyal and attached to the principles of the Constitution of the United States. The statements made by petitioner many years after his naturalization do not clearly show disloyalty or lack of attachment to the Constitution at the time when made and cannot in any event be related back to the five year period prior to his naturalization to show his disloyalty during that period.

II. The decision of the court below denies to petitioner the freedom of thought and speech guaranteed by the First Amendment to the Constitution.

III. Section 338 of the Nationality Act of 1940 as interpreted by the courts below would be unconstitutional in that it would give to courts of the United States the power to vacate judgments of other courts on grounds other than lack of jurisdiction or extrinsic fraud.

X.

ARGUMENT.

Point No. 1.

The government has failed to establish that petitioner fraudulently or illegally procured his citizenship.

(a) **The burden of proof.**

The burden of proof is on the government, and it must prove its case by evidence which is clear, unequivocal and

convincing. *Schneiderman* v. *United States*, 320 U. S. 118 (1943). This is especially true where, as here, fraud is alleged. *Lalone* v. *United States*, 164 U. S. 255 (1896); *United States* v. *Bell Telephone Co.*, 167 U. S. 224 (1897).

(b) **The government's theory.**

On May 16, 1932, petitioner filed his petition for naturalization which set forth under oath, among other things, that:

> "I am attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States. It is my intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and particularly to The German Reich, of whom (which) at this time I am a subject (or citizen), and it is my intention to reside permanently in the United States."

On September 26, 1932, petitioner took the following oath of allegiance in open court:

> "I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign price, potentate, state, or sovereignty and particularly to The German Reich of whom (which) I have heretofore been a subject (or citizen); that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion; So Help Me God. In acknowledgment whereof I have hereunto affixed my signature."

The government has charged that the above representations and oath of allegiance were false and fraudulent and that petitioner's certificate of naturalization was fraudu-

lently and illegally procured. It is not charged that the naturalization proceedings were defective in any other manner. (R. 3.)

The Nationality Act of 1940 authorizes the cancellation of certificates of citizenship procured (1) by "fraud" or (2) "illegally" (Sec. 338). The first ground, fraud, exists when a petitioner for naturalization (or one of his witnesses with his connivance) knowingly and falsely represents that he has fulfilled all the requirements of the statute. The second ground, illegality, exists when a necessary requirement for naturalization has not been fulfilled. This latter may occur by the action or mistake of a person other than the party petitioning for naturalization. This Court has held that the corresponding section (§15) of the Act of 1906 "makes nothing fraudulent or unlawful that was honest and lawful when it was done." *Johannessen* v. *United States*, 225 U. S. 227, 242 (1912).

In the present proceedings the illegality charged is the alleged insincerity of the oath of allegiance to the United States and of the attachment to its Constitution and laws. The fraud charged is that petitioner falsely and fraudulently took the oath of allegiance and that he falsely and fraudulently represented that he was attached to the Constitution and laws of the United States.

Thus it is clear that the theory of the government is that the naturalization certificate was illegally procured because petitioner falsely and fraudulently represented his attachment to the Constitution and laws of the United States and falsely and fraudulently took the oath of allegiance to the United States. To prove the illegality the fraud must be established, and once fraud is established the illegality follows. Petitioner is, in effect, charged with perjury.

The alleged fraud and illegality are fixed as of September 26, 1932, the date when petitioner took the oath of allegiance to the United States. The fraud itself turns

on what petitioner's thoughts and intentions *were* in 1932. But the inquiry concerning this fraud was not limited to what petitioner consciously thought, but was extended to thoughts that dwelt in his subconscious mind—which petitioner was not even aware of and had no means of ascertaining.

Thus the Circuit Court of Appeals states:

> "*What that allegiance is, only the alien can know, but he is bound to know.* The great importance of the proceeding to the United States and the fact that only the alien can know what his real allegiance to this country is compel the conclusion that, if the alien mistakenly swears to an allegiance which he does not possess or which perhaps, for reasons overlooked by or unknown to him at the time of his naturalization, he can never possess, he has failed to satisfy this requirement for his admission to citizenship. *It is the fact of the alien's allegiance to this country at the moment of naturalization and not his belief concerning it upon which the right to naturalization depends.*" (R. 346; italics added.)

The proceedings to denaturalize the petitioner are a by-product of the present world conflict. They are saturated with all of the suspicion, fear and other emotions incident to such a struggle. They bear little, if any, resemblance to the normal trial under American jurisprudence. They are more in the nature of an inquisition.

The petitioner testified that he was loyal to the United States when he took the oath of allegiance in 1932; he testified that he is still loyal to the United States; he testified that none of his thoughts or intentions were false and fraudulent at any time. There was no proof of the falsity of his assertions by evidence upon which a finding of fact would be based in a normal court proceeding. To prove the fraud the District Court was called upon to listen to a mass

of testimony as to what petitioner said years after his naturalization and to read a translation of a small portion of petitioner's diary kept from 1938 to 1941.

(c) The evidence.

The evidence introduced by the government may be divided into two parts: (1) oral testimony of witnesses and (2) petitioner's diary.

The oral testimony of witnesses fills 103 pages of the record. There is no evidence that petitioner was in any way disloyal or wanting in attachment to the Constitution of the United States during the vital five year period prior to September 26, 1932. Only one witness, John R. McKenzie, went back this far in testifying as to petitioner's statements. He testified that he talked to petitioner in his first week of employment with the Kansas City Power and Light Company, in August, 1927, which was prior to the five year period. His testimony, offered with a remarkable degree of certainty after a lapse of fifteen years, was to the effect that petitioner was not enthused over the German government but was enthused about "the present Hitler power over there", and German superiority in schools, drawings, sub-stations, etc. (R. 41-42). However unwise such comparisons may have been, they certainly showed no lack of attachment to the Constitution of the United States.

The entire remainder of the oral testimony embraced statements alleged to have been made by petitioner at least five years after his naturalization. For fifteen years the petitioner had lived in this country and obeyed its laws. He worked hard, paid his bills, and was active in the social, religious and political life of his city. He was never arrested for any violation of the law, and he has never done any act which has been criticized. Between 1937 and 1940 he openly stated that he did not believe this country should

go to war, that he believed the dismemberment of European nations after the last war wrong and that it justified the new unification.

This oral testimony as to statements alleged to have been made by petitioner from 1937 to 1941 may be roughly classified as follows:

(1) Praise of Germany and Hitler's work for Germany (R. 32, 37, 56, 58, 61, 72, 80, 83-85, 89-92, 93).

(2) Approval of Germany's course of action (R. 38, 70, 91, 95, 96).

(3) Comparison of conditions in German with those in the United States (R. 35, 44).

(4) Comparison of German and United States governments (R. 39-40, 52, 67).

(5) Criticism of the United States government (R. 84).

(6) Opposition to Jews (R. 38, 47, 67).

(See Record 191-209 for petitioner's explanation of many of these statements.)

The oral testimony of the government witnesses is essentially weak in several respects:

(1) The petitioner's alleged statements were made from one to five years before the testimony was given, and the witnesses naturally for the most part spoke either in vague generalities or offered their own conclusions as to what petitioner said.

(2) These witnesses in a time of war, with all its uncertainty, tensions and emotion, were applying hindsight,—were recollecting in the atmosphere of 1942 remarks made under very different circumstances. Under such circumtances even the most honest witness might perhaps unconsciously elaborate innocent remarks and statements and read into them meanings never intended by the speaker.

(3) Some of the government's witnesses were naturalized citizens of German birth who might themselves be denaturalized if their statements were considered unpatriotic. The cross-examination of Dr. Andreas Bard is typical of the sort of pressure to which a naturalized German who dares to appear for a defendant in a denaturalization proceeding may be subjected (R. 140-143).

The only other evidence produced by the government was petitioner's diary written in German from 1938 to 1941. Petitioner told the F.B.I. Agent, J. W. Menzie, at the time of his original investigation of petitioner's quarters, that two volumes on his desk were his diary (R. 102-104). No attempt was made to conceal or hide the diary; in fact petitioner voluntarily translated several passages. He did not at any time act like a guilty man. This diary was sent to Washington and translated in part by an employee of the F.B.I., one Gerald P. Hunt (R. 108). This partial translation is included in the record. The evidence clearly discloses that a translator frequently gets a meaning different from that of the author. It further discloses that Hunt's translation resolved doubts against petitioner; that is, if a passage could have a meaning in harmony with or opposed to majority American thought, Hunt selected the latter (R. 108-113). Hunt combed the diary; he selected all the passages which, *after he had interpreted them*, might be detrimental to the petitioner. These 192 passages taken from a two volume diary kept over a period of 939 days (December 1, 1938, to June 27, 1941) are printed in the record at pages 251 to 297, a total of 47 pages. These government-selected extracts of two volumes, torn from their context, devoid of any of the softening influences of normal daily events, and translated by an antagonist, constitute the government's documentary evidence in this case. An examination of the diary shows there were entries on 760 different days.

The entries made by petitioner in the translated portion of his diary may be roughly classified as follows:

1. Favorable criticism of German activities and Hitler (R. 256, 262, 293, 295, 296).

2. Listening to German short wave radio (R. 253, 258, 261, 263, 264, 267, 271, 273, 274, 280, 296).

3. Comments pertaining to his family and its visit to Germany (R. 256, 257, 262, 269, 272, 277, 279, 280, 282, 283, 291, 296).

4. Adverse criticism of England or English foreign policy (R. 253, 262, 264, 266, 271, 281).

5. Adverse criticism of America and American foreign policy (R. 254, 255, 262, 263, 265, 280, 292, 293, 295, 296, 297).

6. Unfavorable comments concerning Jewish activities (R. 252, 253, 254, 255, 256, 257, 262, 273, 287, 289, 290).

It is on the basis of these statements of political, social, and economic views, recorded in the most personal place without considered reflection, over a two and one-half year period—December 1, 1938 to June 27, 1941—that the government has sought to establish fraud on September 26, 1932.

The government did *not* introduce any evidence of:

(1) *any unlawful or disloyal act or deed* of petitioner, at any time;

(2) *any thought or statement* indicative of lack of attachment or allegiance to the United States in the five years preceding his naturalization;

(3) *any advocacy* by petitioner of the use of force or violence;

(4) *any membership* in an organization carrying on activities harmful to the interest of the United States;

(5) *any oral or written statement* by petitioner since June, 1941, bearing on his attachment or allegiance to the United States.

Petitioner denied many of the statements attributed to him. Others he explained. He explained the entries in his diary which he kept as a record of his day-by-day reaction to current events with the thought of its possible interest to him after ten or fifteen years (R. 158-209). He frankly admitted a natural love and affection for the country of his birth. This feeling is common to many naturalized citizens. At the time of naturalization new citizens are often advised by the court to retain interest in the land of their birth and affection for the things they have known before. They are not told to hate any race or people; rather they are told all men are created equal. They are told that citizenship is a privilege which carries with it the duty to vote and to participate actively in the conduct of their new government.

A loyal citizen of the United States attached to the principles of the Constitution may without inconsistency believe that a dictatorship is *in some respects* (as, for instance, efficiency) superior to a democracy. He may also believe that a dictatorship in a foreign country, in view of the history and local conditions of that country, is for the time being better than what preceded it.

The courts below did not try to analyze petitioner's views on racial superiority or his opposition to the political activity of the Jewish people. Petitioner testified that his objections to the Jewish people were not based on race hatred but on his belief that as a political group they wanted the United States to enter this war against Germany (R. 164). He was also against other political groups who advocated the same course. With respect to race superiority, petitioner testified that he believed that the German people as a race were superior in some aspects;

that likewise the American, English, French and other peoples were superior in other aspects. Racial superiority is applied by petitioner to specific talents of all races. It is not a broad generalization that one race is *for all purposes* superior to another race (R. 163-165).

In order to understand petitioner's statements from 1937 to 1941 reflecting his amazement at Germany's outward progress under Hitler, it is necessary to consider them against the background of political and economic events in Germany from November, 1919, when he was repatriated after World War I, until September, 1932, when he was naturalized. We assume that the Court will take judicial notice of these conditions, including the growing political chaos and the fabulous inflation which almost eliminated the middle class and made the outlook for the younger generation of Germans so dark that they were willing to turn to almost any leader who promised a way out. A very short sketch of some of these political and economic conditions during the period from 1919 to 1933 is added as Appendix B to this brief.

A number of witnesses, including the ministers of the two churches to which he belonged, testified that he was a man of good character and a good citizen (R. 138-145).

Petitioner is being deprived of the priceless privilege of citizenship because he exercised his right to think and speak. The trial judge violently condemned this man, but only after attributing to him, solely by inference, a belief in and an unqualified indorsement of infamous acts committed by Hitler and the present German government but not once mentioned in the evidence (R. 25-26). The findings of fact "are but the most general conclusions of ultimate fact." *Schneiderman* v. *United States, supra.*

Such was the evidence purporting to show that petitioner had a disloyal attitude of mind during the years 1937-1941.

To establish this disloyal attitude of mind for the years 1937-1941 it was necessary for the District Court to find as a fact that a person who listened to German broadcasts, read an occasional German publication, approved of certain specific actions taken by the German government and opposed the trend of this country toward war, could not be loyal to the government of the United States. In order to reach this result the District Court not only completely accepted the testimony of the government's witnesses but went a step further by concluding that anyone who could approve of certain actions taken by the Third German Reich must therefore be devoted to *all* the acts of that government and *all* of the philosophy of even the most rabid exponent of the course of action followed by that government.

We submit that the findings of the lower courts were not justified and that the government has failed to prove by clear, unequivocal, and convincing evidence that petitioner has at any time been disloyal or lacking in attachment to the Constitution of the United States.

(d) Evidence of petitioner's political views between 1937 and 1941 is not evidence of fraud or illegality in 1932.

But even if we assume for purposes of argument that findings of fact that petitioner was disloyal in 1937 or 1941 were supported by clear and convincing evidence, the Court was met by a still more serious problem. To find that this petitioner fraudulently and illegally obtained his naturalization certificate it was necessary to find that a disloyal attitude of mind during 1937-1941 *precluded* the possibility of a true oath of allegiance in 1932. The District Court did in fact so conclude. "There is only one possible conclusion to be reached" (R. 27).

Under the lower courts' theory good faith at the time the oath of allegiance was taken is immaterial. The im-

portant thing is the subconscious attitude of mind which is not capable of being measured by any known standard. Such a theory of fraud and illegality renders highly vulnerable the constitutional rights of all naturalized citizens. This Court has never approved the interpretation of fraud expressed by the courts below.

We take it that in spite of certain differences of opinion in the *Schneiderman Case, supra,* this Court was in agreement with the Chief Justice that a naturalized citizen's attachment to the principles of the Constitution when he applied for citizenship "must be inferred by the trier of facts from his conduct during the five year period" (p. 171) prior to such naturalization. The same must be true of his loyalty.

But the courts below determined these questions not from petitioner's "conduct during the five year period" prior to his naturalization but from what he said and wrote five to nine years thereafter. In order to do this it was necessary to "relate back" to 1932 what he said and wrote in 1937 to 1941.

The government has sought to impute fraud to petitioner in the year 1932 by "relating back" thoughts entertained and statements made by him during the years 1937-1941. Two fundamental vices of this principle of "relation back" are (1) that it is based on the fiction that we live in a static world and (2) that it falsely assumes that the meaning of words and phrases is immutable and unrelated to the circumstances under which they are spoken or written. It asserts that what one says and thinks in 1940 can be treated as though spoken or thought in the atmosphere and circumstances of 1930 or 1920 and show what one's attitudes in 1930 or 1920 were. The present case is typical of the grotesque results of such a fallacy.

Thus the courts below entirely overlooked important

economic and political facts prior to 1933 and a supervening force in the year 1933 which render untenable the fiction of relation back:

> "It cannot be too strongly reiterated that as late as a month before Hitler became Chancellor, his cause was still accounted hopelessly lost by responsible opinion. Even in December, 1932, when the writer discussed the political and economic situation with German businessmen, they always considered it useless nonsense to discuss what the economic policies of the National Socialist Party would be if it came to power. 'Historical curiosity' and 'the German Boulanger' were some of the terms applied to Hitler at this time. It was astonishing how two months later these same men were to insist publicly that he was a 'real statesman', as they shivered in anticipation of his next move on the economic front. But until he was securely in power they were all agreed that he had a biological aversion to the acceptance of responsibility, that his favorite role was that of the 'drummer' who roused the mob, that his terms for entering the cabinet were so severe because he hoped thus to put off the day when he must abandon his 'drumming' and make decisions." Calvin B. Hoover, *Germany Enters the Third Reich* (1934), p. 95.

Hitler's Third German Reich came into being in 1933. For several years it limited its activities to Germany. Many people all over the world were convinced, however wrongly, that it was a good thing. In the words of the District Court (R. 26):

> "The full measure of Hitler's depravity was not, in the beginning, known to the world."

It was not until years after 1932 that the world began to realize the true nature of the course of action the Third German Reich was going to follow. Leading statemen of the world misjudged its potential power, then were later

deceived as to its real purposes. It is not strange that petitioner, who wanted to see the nation of his birth again become a respected and strong nation, should also have been deceived. Petitioner had reason to hope and believe that Germany had a strong, good government; the normal sentimental interest he had in his native country not unnaturally blinded his reason and led him to believe that reports of atrocities were false. Viewed objectively his falsely aroused emotional reactions are far more understandable than the reactions of many prominent world leaders.

The fact that there was no Third German Reich, as we now know it, in 1932 emphasizes the impropriety of the application of the fiction of "relation back." Petitioner could not retain allegiance to a government which did not come into existence until after he had taken his oath of allegiance, nor could he be attached to such a non-existent government. It is an unusual compliment and at the same time a gross injustice to find as a fact that petitioner in 1932 foresaw the future that neither Germany nor the rest of the world believed possible.

It required a definite provision in Section 15 of the naturalization law to create a presumption "relating back" foreign residence within five years after the date of admission to citizenship [Act of June 29, 1906, c. 3592, § 15, 34 Stat. 601, as amended; 8 U. S. C. (1934 Ed.) § 405]. In upholding the presumption thus created this Court has pointed out that it becomes weaker and weaker during the five year period. *Luria* v. *United States*, 231 U. S. 9 (1913).

The principle of "relation back" of expressions of disloyalty was first invoked in 1918 in *United States* v. *Wursterbarth*, 249 Fed. 908, by the United States District Court for New Jersey. In this case a native of Germany naturalized in 1882 made disloyal statements during World War I. Judge Haight said:

"As the years succeeding his naturalization passed, coupled with the fact that he continued to dwell within our midst, associate with our citizens, receive the benefits which this nation and its institutions have conferred upon him, acquire property here, and hold public office * * *, it is natural to presume that his affection and feeling of loyalty and allegiance to this country would increase, and that any ties which bound him to the country from which he came would correspondingly decrease.

"If, therefore, under such circumstances, after 35 years, he now recognizes an allegiance to the sovereignty of his origin, superior to his allegiance to this country, it seems to me that it is not only permissible to infer from that fact, but that the conclusion is irresistible, that at the time he took the oath of renunciation, he did so with a mental reservation as to the country of his birth, and retained toward that country an allegiance which the laws of this country required him to renounce before he could become one of its citizens. Indeed, for the reasons just stated, his allegiance to the former must at that time have been stronger than it is at present" (p. 910).

While this principle has been followed in some cases, mostly under the stress of war, it has been rejected in others, of which the following are typical:

United States v. *Woerndle*, 288 Fed. 47 (C. C. A. 9th 1923);

Rowan v. *United States*, 18 F. (2d) 246 (C. C. A. 9th, 1927);

United States v. *Jentzsch*, 48 F. Supp. 482 (D. C. M.D. 1942);

United States v. *Polzin*, 48 F. Supp. 476 (D. C. M.D. 1942);

United States v. *Hartmann*, 51 F. Supp. 394 (D. C. E.D. Pa. 1943);

United States v. *Hugg*, 51 F. Supp. 397 (D. C. E.D. Pa. 1943);

United States v. *Kuhn*, 51 F. Supp. 400 (D. C. E.D. Pa. 1943).

Apparently realizing the weakness of the principle and the fact that some courts would not follow it, the Attorney General presented to the 77th Congress a bill, H. R. 6250, Sec. 8 of which provided an additional ground for denaturalization, viz., "on the ground that his utterances, writings, actions, of course of conduct establishes that his political allegiance is to a foreign state or sovereignty." This bill passed the House but not the Senate: 88 Cong. Rec. pp. 292/5, 296/308, 319, 8673, 9570.

The doctrine becomes even more grotesque when we consider that the so-called "fraud" may be entirely unconscious. The naturalized citizen may admittedly have taken the oath of allegiance in the utmost good faith and still have his citizenship revoked on the ground that the oath was "fraudulent" because some court years later finds that in his subconscious mind he was not in fact attached to the Constitution and loyal to the United States though he fully believed that he was.

Thus in the present case the Circuit Court of Appeals states:

> "If the alien mistakenly swears to an allegiance which he does not possess or which perhaps, for reasons overlooked by or unknown to him at the time of his naturalization, he can never possess, he has failed to satisfy this requirement for his admission to citizenship. It is the fact of the alien's allegiance to this country at the moment of naturalization and not his belief concerning it upon which the right to naturalization depends" (R. 346).

We are at a loss to understand this metaphysical idea of loyalty and allegiance. We had supposed that they are matters of the mind and will and that if one consciously and in good faith devotes himself to a country or an individual he is at that time loyal to the object of his devotion, no matter how much he may swerve from that loyalty in later years.

Furthermore, there is no reason why, if the principle of "relation back" is sound, it should not also apply to requirements other than loyalty—as, for instance, to good moral character. But no court, we believe, has had the temerity to hold that because a naturalized citizen five or ten years after his naturalization commits a crime involving moral turpitude he may be denaturalized on the ground that this shows he was not of good moral character in the five years preceding his naturalization. See *United States* v. *Tedesco*, 31 F. Supp. 322 (D. C. S. D. N. Y. 1940).

Nor can the findings be justified on the basis of the query put to the petitioner by the District Court as to whether his loyalty was the same when he testified in 1942 as it was when he took the oath of allegiance. There is no question but what he considered himself loyal at both times and consequently his answer to the question was in the affirmative. If his answer had been in the negative, it would not only have been false but would have convicted him of disloyalty. Furthermore, if as the Circuit Court indicates, his loyalty or disloyalty was a subconscious attitude "unknown to him at the time of his naturalization," how could he know of it in 1942?

The government has not established by clear, unequivocal, and convincing evidence that the petitioner fraudulently and illegally procured his citizenship, and for this reason the judgment of the court below is erroneous.

Point II.

The decision of the court below is a denial of the freedom of thought and freedom of speech guaranteed petitioner.

The First Amendment to the Constitution of the United States provides in part:

> "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *."

The time when the First Amendment was adopted is indicative of its importance. With the battle for freedom fresh in the minds of the American people, they sought to make it possible for the future generations to think and to speak, openly and without fear, the opinions they held pertaining to the government. The wisdom of these early Americans in so providing is unquestionable. Freedom of thought and speech with respect to controversial political activity is a minimum requirement for democratic government. To further insure freedom of thought and speech the authors of the Constitution defined treason:

> "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." (Art. III § 3.)

The effect of the decision below is to abridge the freedom of thought and speech of petitioner. Petitioner was deprived of his citizenship because in the opinion of the court below his political beliefs indicated a lack of attachment to the Constitution and laws of the United States.

In the case of *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, (1943), Mr. Justice Jackson, speaking for this Court, said:

"It is now a commonplace that censorship or suppression of expressions of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the state is empowered to prevent and punish." (p. 633.)

"But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. *The test of its substance is the right to differ as to things that touch the heart of the existing order.* (Italics added)

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." (p. 642)

This Court has held, in the case of *Bridges* v. *California*, 314 U. S. 252 (1941), that freedom of speech and opinion exists at all times for all citizens (Mr. Justice Black):

"Ratified as it was while the memory of many oppressive English restrictions on the enumerated liberties was still fresh, the First Amendment cannot reasonably be taken as approving prevalent English practices. On the contrary, the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society." (p. 265)

"No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression." (p. 269)

In his dissenting opinion in *United States* v. *Schwimmer*, 279 U. S. 644, (1929), Mr. Justice Holmes said:

"* * * But if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not

> free thought for those who agree with us but freedom for the thought we hate." (pp. 654, 655)

There is no doubt that the authors of the Constitution and the First Amendment intended them to apply with equal force to all citizens, native-born and naturalized. They realized the United States would grow and that this growth would be the result of immigration from other countries.

As early as *Osborn et al* v. *The Bank of the United States*, 9 Wheat, (U. S.) 738, (1824), this Court recognized that naturalized citizens had the same rights, powers, privileges and duties as native-born citizens and that Congress, even though authorized to establish naturalization requirements, was without power to classify citizens on such a basis. In the case of *Luria* v. *United States*, 231 U. S. 9, (1913), this Court held:

> "Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency." (p. 22)

The danger of setting up two classes of citizenship is apparent. The naturalized citizen would never be free to think and speak. He would have to examine with suspicion each organization he cared to join. He would have to weigh with precision each word he uttered. The words of Mr. Justice Rutledge in his concurring opinion in the *Schneiderman Case*, *supra*, p. 167, are applicable here:

> "His best course would be silence or hypocrisy. This is not citizenship."

To set up a double standard of freedom of speech, one for the native-born and one for the naturalized citizen, would deny the equal protection of the law impliedly granted by the Fifth Amendment insofar as fundamental civil rights are concerned: *Hirabayashi* v. *United States*, 320 U. S. 81, (1943).

POINT III.

Section 338 of the Nationality Act of 1940 as here applied would be unconstitutional.

Article III, Section 1, of the Constitution of the United States provides:

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Naturalization is a judicial proceeding.
Tutun v. *United States*, 270 U. S. 568 (1926);
Schneiderman v. *United States*, *supra*.

Article I, Section 8, Clause 4, of the Constitution provides that Congress shall have power:

> "To establish a uniform Rule of Naturalization * * *"

While the power of naturalization is exclusively in Congress, it has conferred the function of admitting to citizenship exclusively upon courts since the foundation of our government (see Act of March 26, 1790, Chap. 3; 1 Stat. 103).

It was early held that a naturalization decree was a judgment not subject to collateral attack. *Spratt* v. *Spratt*, 4 Peters 393 (1830). In this case, which involved a question of title to land, Mr. Chief Justice Marshall in speaking of naturalization stated:

> "The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. This judgment is entered on record as the judg-

ment of the court. It seems to us, if it be in legal form, to close all inquiry; and, like every other judgment, to be complete evidence of its own validity.

"The inconvenience which might arise from this principle, has been pressed upon the court. But the inconvenience might be still greater if the opposite opinion be established. It might be productive of great mischief, if, after the acquisition of property on the faith of his certificate, an individual might be exposed to the disabilities of an alien, on account of an error in the court not apparent on the record of his admission." (pp. 407-408).

In passing upon an application for citizenship the court exercises judicial judgment subject to appeal.

Tutun v. *United States*, 270 U. S. 568 (1926).

It is submitted that Congress does not have the power to enact legislation the effect of which is to authorize a court to set aside or annul a judgment or decree of a coordinate court of competent jurisdiction except in cases of extrinsic fraud or for errors apparent on the record.

In the case of *United States* v. *Throckmorton*, 98 U. S. 61 (1878), this Court held:

"The acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered." (p. 68).

The integrity of a final judgment rendered by a court of competent jurisdiction is an essential requirement for the proper functioning of any judicial system. The power to enter a final judgment is an inherent judicial power which is not subject to interference by legislative action.

Before discussing the decisions of this Court under Section 15 of the Naturalization Act of 1906, substantially re-

enacted in Section 338 of the Nationality Act of 1940 (34 Stat. 1158; 8 U. S. C. Sec. 738), it may be worth while to recall that this section was enacted principally because of the illegal practices of officials in St. Louis in issuing spurious certificates. It was at first held by some of the district courts that this section should be restricted to cases involving conditions similar to those which brought about the enactment of this section. See *United States* v. *Lenore*, 207 Fed. 865 at 867-868 (1913), in which Judge Amidon in refusing to cancel a certificate of naturalization because of the fact that the petition had been signed by mark, the United States having been represented at the naturalization hearing by counsel, gives a history of the abuses which led up to the enactment of Section 15.

All but one of the cases in which this Court has approved the cancellation of citizenship certificates under Section 15 arose prior to 1926 and were decided on the basis either that the naturalization proceeding was ex parte or that error appeared in the record.

It seems doubtful whether naturalization proceedings at any time after 1906 could properly be considered as ex parte in view of the fact that (1) the United States was given the right to appear and actively participate therein [Act of June 29, 1906, Sec. 11; 8 U. S. C. (1925 Ed.) Sec. 399], (2) complete notice of the final hearing was required to be posted by the Clerk of the Court [Sec. 5; 8 U. S. C. (1925 Ed.) Sec. 397] and (3) ninety days was required to elapse after the filing of the petition and posting notice before the final hearing could be held [Sec. 6; 8 U. S. C. (1925 Ed.) Sec. 396].

Black in defining *ex parte* states: "A judicial proceeding, order, injunction etc., is said to be *ex parte* when it is taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested." [Black's Law Dictionary (3rd Ed., 1933)].

However this may be, a naturalization proceeding since 1926 can certainly not be considered *ex parte*. In that year the Immigration and Naturalization Service, following the passage of the Act of June 8, 1926 [c. 502, 44 Stat. 709; 8 U. S. C. (1925 Ed.) Sec. 399 (a), page 1898], authorizing the judges of the district court to designate examiners of the Bureau of Naturalization to conduct preliminary hearings and make findings and recommendations thereon, adopted a new system for the examination of applicants for naturalization. Under this procedure an applicant, before he files his petition for naturalization, is examined by an examiner of the naturalization service to ascertain that the witnesses are competent and that the alien is able to file a valid petition. After the petition is filed there is a preliminary hearing in the Bureau, open to the public and presided over by a second examiner, named by the court under the Act of 1926, called the "designated examiner." All evidence, favorable and unfavorable, is received and all pertinent information is sought to be obtained to the end that the designated examiner may make correct findings. On completion of the preliminary hearing the designated examiner prepares a record thereof, and this record is kept available for the naturalization court.

The designated examiner then recommends to the court that the petition be granted, denied or continued. Notice of the final hearing is posted by the Clerk of the Court, and ninety days must elapse before the final hearing. At the final hearing in open court before a judge of the district court a naturalization examiner appears in behalf of the United States. This examiner is not necessarily the same examiner who acted as the preliminary examiner, nor is he necessarily the designated examiner. Wherever it is possible an examiner other than either of these is assigned to attend the final hearing in open court. The United States

Attorney may of course also attend and oppose the application.

We understand this procedure was followed in the naturalization of this petitioner in 1932. We submit that a judgment entered after such a detailed procedure, designed to safeguard the rights of the United States and those of the applicant for citizenship, cannot be said to be the result of an *ex parte* proceeding.

In cases in which this Court has upheld denaturalization proceedings under Section 15 of the Act of 1906, it has proceeded on the assumption that the naturalization proceedings there involved were *ex parte*. There can, we submit, no longer be any sound basis for such an assumption in naturalization cases arising since 1926.

In the first of these cases, *Johannessen* v. *United States*, 225 U. S. 227 (1912), the appellant had been naturalized in 1892 in a state court in Washington less than four years after his arrival in the United States. Mr. Justice Pitney in delivering the opinion of the Court pointed out that prior to the passage of the Naturalization Act of 1906 there was no provision in the law requiring notice to the government or authorizing the United States to appear in the naturalization proceedings. While he assumed that a right to appear existed without express enactment, he stated:

> "What may be the effect of a judgment allowing naturalization in a case where the government has appeared and litigated the matter does not now concern us. See 2 Black, Judgm. § 534a. What we have to say relates to such a case as is presented by the present record, which is the ordinary case of an alien appearing before one of the courts designated by law for the purpose, and, without notice to the government, and without opportunity, to say nothing of duty, on the part of the government to appear, submitting his application for naturalization with *ex parte* proofs in support thereof, and thus procuring a certificate of citizenship. In view of the great number of aliens thus applying at

irregular times in the various courts of record of the several states and in the Federal circuit and district courts throughout the Union, and bringing their applications on to summary hearing without previous notice to the government of the United States or to the public, it is, of course, impossible that the public interests should be adequately represented, and in our opinion the sections quoted from the Revised Statutes are not open to any construction that would give a conclusive effect to such an investigation when conducted at the instance of and controlled by the interested individual alone. (pp. 237-238).

* * * * * * *

"Sound reason, as we think, constrains us to deny to a certificate of naturalization, procured *ex parte* in the ordinary way, any conclusive effect as against the public." (p. 238).

The Bureau of Naturalization was not created until 1906 (Act of June 29, 1906, Section 1), at which time the Bureau of Immigration was redesignated "Bureau of Immigration and Naturalization." At the time Johannessen was naturalized there was no government administrative agency charged with the administration of the naturalization laws. Prior to 1906, therefore, naturalization proceedings might properly be considered as having been *ex parte*.

In all but two of the succeeding cases in which this Court has approved of the cancellation of certificates of citizenship the errors of the naturalization court appeared upon the face of the record. *United States* v. *Ginsberg*, 243 U. S. 472 (1917) (final hearing in judge's chambers instead of in open court as required); *United States* v. *Ness*, 245 U. S. 319 (1917) (certificate of arrival not filed as required)*;

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* Note: This case arose in the 8th Circuit, which held that the Circuit Court of Appeals had no jurisdiction of an appeal from a naturalization decree [*Marx* v. *United States*, 276 Fed. 295 (1921)]. The bill to cancel the decree was filed within six months after it was granted.

Toyota v. *United States*, 268 U. S. 402 (1925) (a Japanese born in Japan is not eligible to citizenship in the United States though serving in the armed forces of the United States during World War I); *Maney* v. *United States*, 278 U. S. 21 (1928) (final hearing within ninety days after filing of certificate of arrival). In each of these cases the decree of naturalization was void on its face and could not be *res judicata*. The only other two cases in which this Court has upheld cancellations of citizenship under Section 15 are *Luria* v. *United States*, 231 U. S. 9 (1913) and *Schwinn* v. *United States*, 311 U. S. 616 (1940).

In *Luria* v. *United States, supra*, the appellant was naturalized in 1894 and within a few months thereafter left for South Africa, where he practiced his profession as a physician until the date of the hearing in the cancellation proceedings in 1910 with the exception of four or five months in 1907 during which he was taking a post-graduate course in a medical school in New York. The principal point decided was the validity of the provision of Section 15 to the effect that taking up a permanent residence in a foreign country within five years after naturalization shall be considered prima facie evidence of a lack of intention to become a permanent citizen of the United States, because there is a rational connection between the fact proved and the ultimate fact presumed. It is to be noted, however, that as the appellant was naturalized long prior to the passage of the Act of 1906, there was therefore ground for holding that the naturalization proceedings were *ex parte*.

In *Schwinn* v. *United States, supra*, the district court cancelled a decree of citizenship on the ground of fraud and illegality in that the two witnesses who subscribed the naturalization petition had not in fact known Schwinn for five years. The Circuit Court of Appeals affirmed upon

the ground of fraud only [112 F. (2d) 74 (C. C. A. 9th, 1940)]. A petition for certiorari was filed in this Court, which entered the following order per curiam: "The petition for writ of certiorari is granted. The judgment is affirmed on the sole ground that the certificate of citizenship was illegally procured." There was, of course, no oral argument and there is no indication that the question here persented was considered.

We therefore submit that since the passage of the Naturalization Act of 1906, and particularly since 1926 when the revised practice of the Bureau of Naturalization was put into effect, it cannot be said that a naturalization proceeding is *ex parte*. If this is so, it would seem that a decree of naturalization should be considered as a binding judgment which like other judgments is open to attack only on the ground of extrinsic fraud or for errors on the face of the record showing its invalidity.

Section 338 of the Nationality Act of 1940 should be limited accordingly, at least insofar as certificates of citizenship granted since 1926 are concerned. To extend it further would raise grave doubts of its constitutionality as an attempt by Congress to authorize a collateral attack on valid final judgments rendered by courts of competent jurisdiction.

XI.

CONCLUSION

We submit that the judgment of the court below denaturalizing petitioner should be reversed because:—

(1) The government has failed to prove by clear, unequivocal and convincing evidence that petitioner took a false oath of allegiance or that during the five years preceding his naturalization he was not attached to the principles of the Constitution of the United States, and has

therefore failed to establish that he procured his citizenship by fraud or illegally;

(2) The decision of the court below denies to petitioner the freedom of thought and speech guaranteed by the First Amendment to the Constitution;

(3) Petitioner's citizenship was not obtained in an *ex parte* proceeding and the decree granting it was a valid final judgment of a court of competent jurisdiction which cannot be revoked or annulled in a proceeding under Section 338 of the Nationality Act of 1940 except for extrinsic fraud or error appearing of record.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX A.

Applicable Statutory Law.

The applicable statutory law in the instant situation is the law pertaining to naturalization of aliens as it was on September 26, 1932, the date petitioner was admitted. The Act of June 29, 1906, Chap. 3592, § 4, 34 Stat. 596, as amended by the Act of March 2, 1929, Chap. 536, § 6, 45 Stat. 1513, provided in part:

> "Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting and duly verified, in which petition such applicant shall state his full name, his place of residence (by street and number, if possible), his occupation, and, if possible, the date and place of his birth; the place from which he emigrated, and the date and place of his arrival in the United States, and, if he entered through a port, the name of the vessel on which he arrived; the time when and the place and name of the court where he declared his intention to become a citizen of the United States; if he is married he shall state the name of his wife and, if possible, the country of her nativity and her place of residence at the time of filing his petition; and if he has children, the name, date, and place of birth and place of residence of each child living at the time of the filing of his petition: *Provided*, That if he has filed his declaration before June 29, 1906, he shall not be required to sign the petition in his own handwriting.
>
> "The petition shall set forth that he is not a disbeliever in or opposed to organized government, or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government, a polygamist or believer in the practice of polygamy, and that it is his intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and

particularly by name to the prince, potentate, state, or sovereignty of which he at the time of filing of his petition may be a citizen or subject, and that it is his intention to reside permanently within the United States, and whether or not he has been denied admission as a citizen of the United States, and, if denied, the ground or grounds of such denial, the court or courts in which such decision was rendered, and that the cause for such denial has since been cured or removed, and every fact material to his naturalization and required to be proved upon the final hearing of his application." [8 U. S. C. (1925 Ed.) § 379.]

"As to each period of residence at any place in the county where the petitioner resides at the time of filing his petition, there shall be included in the petition the affidavits of at least two credible witnesses, citizens of the United States, stating that each has personally known the petitioner to have been a resident at such place for such period, and that the petitioner is and during all such period has been a person of good moral character." [8 U. S. C. (Supp. V, 1931) § 379.]

"At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Labor, if the petitioner arrived in the United States after June 29, 1906, stating the date, place, and manner of his arrival in the United States and the declaration of intention of such petitioner which certificate and declaration shall be attached to and made a part of such petition." [8 U. S. C. (1925 Ed.) § 380.]

"He shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same." [Id., § 381.]

"No alien shall be admitted to citizenship unless (1) immediately preceding the date of his petition the alien has resided continuously within the United States for at least five years and within the county where the petitioner resided at the time of filing his petition for at least six months, (2) he has resided continuously within the United States from the date of his petition up to the time of his admission to citizenship, and (3) during all the periods referred to in this section he has behaved as a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States. At the hearing of the petition, residence in the county where the petitioner resides at the time of filing his petition, and the other qualifications required by this section during such residence, shall be proved by the oral testimony of at least two credible witnesses, citizens of the United States, in addition to the affidavits required by section 379 of this title to be included in the petition." [8 U. S. C. (Supp. V, 1931) § 382.]

The Act of June 29, 1906, Chap. 3592, § 9, 34 Stat. 599 [8 U. S. C. (1925 Ed.) § 398], provides in part:

"Every final hearing upon a petition for naturalization shall be had in open court before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court and entered in full upon a record kept for that purpose, and upon such final hearing of such petition the applicant and witnesses shall be examined under oath before the court and in the presence of the court."

The Nationality Act of 1940, Section 338, 54 Stat. 1158 [8 U. S. C. (1940 Ed.) § 738], which is essentially a re-enactment of Section 15 of the Act of 1906 [8 U. S. C. (1925 Ed.) § 405], provides in part:

"(a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings

in any court specified in subsection (a) of section 701 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and cancelling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured."

Section 11 of the Act of June 29, 1906, c. 3592, 34 Stat. 599 [8 U. S. C. (1925 Ed.) Section 399], which was substantially re-enacted by section 334 (d) of the Nationality Act of 1940, 54 Stat. 1158 [8 U. S. C. (1940 Ed.) Section 734 (d)], provides:

"The United States shall have the right to appear before any court or courts exercising jurisdiction in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition concerning any matter touching or in any way affecting his right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings."

The Act of June 8, 1926, c. 502, 44 Stat. 709 [8 U. S. C. (Supp. V, 1931) Section 399a] (substantially re-enacted by Section 333 of the Nationality Act of 1940) added the following to Section 4 of the Act of June 29, 1906:

"(a) The judge of any United States district court, or the senior judge of such court if there are more judges than one, is hereby authorized, in his discretion, to designate one or more examiners or officers of the Bureau of Naturalization (including the Naturalization Service) serving as such examiner or officer within the territorial jurisdiction of such court, to conduct preliminary hearings upon petitions for naturalization to such court, and to make findings and recommendations thereon. For such purposes any such designated examiner or officer is hereby authorized to take testimony concerning any matter touching or in any way affecting

the admissibility of any petitioner for naturalization, to subpoena witnesses, and to administer oaths, including the oath of the petitioner to his petition and the oath of his witnesses.

"(b) The findings of any such designated examiner or officer upon any such preliminary hearing shall be submitted to the court at the final hearing upon the petition required by section 398 of this title, with a recommendation that the petition be granted or denied or continued, with the reasons therefor. Such findings and recommendations shall be accompanied by duplicate lists containing the names of the petitioners, classified according to the character of the recommendations, and signed by the designated examiner or officer. The judge to whom such findings and recommendations are submitted shall by written order approve such recommendations with such exceptions as he may deem proper, by subscribing his name to each such list when corrected to conform to his conclusions upon such recommendations. One of such lists shall thereafter be filed permanently of record in such court and the duplicate list shall be sent by the clerk of such court to the Commissioner of Naturalization.

"(c) The provisions of section 398 of this title requiring the examination of the petitioner and witnesses under oath before the court and in the presence of the court shall not apply in any case where a designated examiner or officer has conducted the preliminary hearing authorized by this subdivision; except that the court may, in its discretion, and shall, upon demand of the petitioner, require the examination of the petitioner and the witnesses under oath before the court and in the presence of the court."

Applicable Constitutional Provisions.

Article I, Section 8, Clause 4, of the Constitution provides that Congress shall have power:

"To establish a uniform Rule of Naturalization * * *"

Article III, Section 1, of the Constitution provides:

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish * * *".

The First Amendment to the Constitution provides in part:

> "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *"

APPENDIX B.

Shortly after the Social Democrats assumed power in Germany at the close of World War I and no immediate steps were taken toward a socialist commonwealth, the radical wing of the party revolted. The Sparticist rebellion was short-lived after Noske called in the old officer caste to defend the government. The Sparticist rebellion was followed by other later Communist uprisings, which were violently suppressed. This successful method of crushing uprising against the government was responsible for the establishment and growth of Reichswehr. The nucleus of the Reichswehr leadership was collected from leaders of armed bands—officers and soldiers of the old army—who roamed the land fighting Poles in Silesia or local Communist governments. Sometimes these operations were directed by the Social Democrats, sometimes by another party, but most frequently they were the result of the initiative of the armed band itself. An armed band led by Kapp attempted a *putsch* against the Republic in 1920. Hitler attempted a *putsch* in 1923. When such a *putsch* by the military against the government failed, as both of the last mentioned did, there was no thought of serious punishment.[1]

Germany was in a state of economic as well as political turmoil.

During the peace negotiations the value of the German exchange began to decline. It continued to fall rapidly

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Note 1. Calvin B. Hoover, *Germany Enters the Third Reich* (1933) p. 35-37.

until about February, 1920, when it was checked at about 1/24 of its pre-war value. It recovered somewhat in May of that year. In June, 1922, the mark sold for about ⅓ of a cent. From that point on the exchange value dropped until the final collapse in November, 1923, at which time an American cent was worth forty-two billion marks.

During the middle twenties students in Germany were confronted with the fact that it would be virtually impossible to find employment of any nature whatsoever after graduation. Young engineers who were anxious to get practical experience with a large concern such as the German General Electric Company had to pay for the privilege of working. Conditions such as this prevailed in all professions until 1933. These are the circumstances which led petitioner in 1927 to come to the United States to start life anew in a land where he would have an opportunity to earn his living.[2]

After his unsuccessful *putsch* in 1923 Hitler had lost his taste for this method of achieving power. He continued, however, to work diligently to develop the National Socialist Party. Hitler's party established their own armed guard, the *Sturm Abteilung* (S.A.) and the elite *Schutzstaffel* (S.S.), to combat the power of the Social Democrats' *Reichwehr* which had been able to exercise a veto power over the political destiny of Germany as early as 1923. The National Socialist Party was like a festering thorn in Germany's side spreading infection through the body politic until 1933, when the Nazis finally came to power. To the rest of the world the National Socialists were merely another political party struggling for authority in a Germany which was politically, socially and economically bankrupt.

Applying hindsight, the twilight period of the German Republic was about June, 1932, when the last Republican cabinet ended with Chancellor Bruening. When von Papen succeeded Bruening he set up the first "presidential" cabinet, which was indeed a curious affair. The decision to support von Papen's cabinet was a clear rejection by industrialists, bankers, and businessmen of National Social-

[2] Id. p. 25.

ism as a substitute for capitalism. It was the first need for any such rejection because prior to the collapse of Bruening's cabinet there had been no objection to National Socialism. There had been no objection to National Socialism for the simple reason that the industrial leaders, bankers, and businessmen—together with the rest of the world—had observed the entire movement with tolerant indulgence believing it to be nothing more than an expression of nationalism.

The von Papen cabinet was not the strong government that many had believed it to be. There was a long drawn out cabinet crisis from the middle of November until early in December, 1932. The crisis culminated in the removal of an embittered von Papen and in the installation of Chancellor von Schleicher. With the advent of Chancellor von Schleicher—the "strong man"—all Germany breathed more easily, believing that Germany was in good hands and the National Socialist movement under Hitler could be forgotten.

Late in January, 1933, Hitler was appointed Chancellor by von Hindenburg to head a coalition government.[3]

[3] Id. p. 50-95.